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IN THE

Supreme Court of the United States

Harry J. Kirk, et al.,
Appellants,
vs.
The Maumee Valley Electric Company,
Appellee.

No. 674.
October Term,
1928.

Harry J. Kirk, et al.,
Appellants,
vs.
The Providence Mill Company,
Appellee.

No. 675.
October Term,
1928.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division.

MEMORANDUM IN REPLY ON BEHALF OF HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO.

Under leave granted at the argument herein, this reply memorandum is submitted.

A.

CANAL LEASES IN OHIO GIVE LESSEES AS MATTER OF FACT NO ABSOLUTE RIGHT TO WATER; THEY WERE AND ARE MERE PRIVILEGES TO TAKE SURPLUS WATER FROM THE CANALS; CANAL ABANDONMENT, THEREFORE, WORKS NO BREACH OF ANY OBLIGATION OF THE STATE AND CONSEQUENTLY CANAL ABANDONMENT AS A MATTER OF CONTRACT LAW GIVES NO RIGHT TO COMPENSATION TO THE LESSEES.

Despite the compendiousness of opponents' "brief", the question at issue is simply this: Can the state of Ohio, by act of its legislature, abandon part of its canals without payment of compensation to those holding leases thereon for canal water? The question is identical with the question before the Supreme Court in Fox v. Cincinnati, 104 U. S., 783. Chief Justice Waite, speaking for the court, stated the question thus (p. 785):

> "The single question we have to consider is whether there is anything in the lease under which Fox claims which prevents the state from making such an abandonment, without compensation to him."

The gist of the court's decision, reviewing the status of canal water leases under Ohio statutes, is then given as follows:

> "The use of the water for hydraulic purposes is but an incident to the principal object for which the

canal was built, to wit, navigation. The large expenditures of the state were to furnish, not water-power, but a navigable highway for the transportation of persons and property. The authority of the board of public works to contract in respect to power was expressly confined to such water as remained after the wants of navigation had been supplied; and it never could have been intended in this way to impose on the state an obligation to keep up the canal, no matter what the cost, for the sole purpose of meeting the requirements of its water leases. There was certainly no duty resting on the state to maintain the canal for navigation any longer than the public necessities seem to require. When it was no longer needed, it might be abandoned; and, if abandoned, the water might be withdrawn altogether. Provision was made for resuming the water and stopping the supply, if the canal was kept up for navigation; but no such provision was necessary in respect to the abandonment of the whole work, because the right to abandon followed necessarily from the right to build. If the water was resumed while navigation was maintained, no matter how injuriously it affected lessees, all that could be asked of the state was to forego the further collection of rents, or refund a reasonable proportion of such as had been paid in advance. The entire abandonment of the canal could not create any different liability. Every lessee of power took his lease and put up his improvements with full notice of the reserved right of the state to discontinue its canal and stop his supply of water.

This is in accordance with repeated decisions, both in Ohio and other states, and seems to us fully sustained on principle and authority. Hubbard v. City of Toledo, 21 Ohio St., 379." (And other cases.)

See also:

Walsh v. Columbus Ry., 179 U. S., 469.

Opponents contend that the principles of law and the facts in relation to the subject matter here involved have changed since the authoritative decisions by the Supreme Court of Ohio in Hubbard v. Toledo and of the Supreme Court of the United States in Fox v. Cincinnati. The claim is that Ohio, in relation to canal leases, has lately been acting in a proprietary or private capacity and, though opponents' legal philosophy is not clearly disclosed, the conclusion is reached that therefore the canals cannot now be abandoned without payment of compensation to the water lessees; and opponents led the court below into this error (Maumee Rec., p. 175). This argument proceeds on a misconception of the legal principles underlying the lines of authorities started in Fox v. Cincinnati and Hubbard v. Toledo. Those decisions are not bottomed on the principles of state sovereignty but on the simple principles of contract law. The reason the state of Ohio can abandon the canals without compensation to the water lessees is not because, as an exercise of sovereignty, it can with impunity break its contract, but because it made no contract to deliver water, as such. The interpretation put on these water leases by the Supreme Courts of Ohio and the United States, basing the interpretation upon the language used in the leases and upon the state law under which they were authorized to be made by the board of public works, was that they were not contracts absolute to deliver water, but were merely contracts giving the lessees or privilegees the right to take surplus canal water and imposing no obligation upon the state to have surplus or to continue a canal.

To establish the correctness of this analysis, it is only necessary to look at the language of the decisions. In Fox v. Cincinnati, at page 785, the court says:

> "It never could have been intended in this way to impose on the state an obligation to keep up the canal, no matter what the cost, for the sole purpose of meeting the requirements of its water leases."

And, in the decision of Hubbard v. Toledo, at page 396:

> "True, the period stipulated for the duration of their lease has not expired; but the instrument or lease was a mere license for them to take, not an obligation on the part of the state to furnish. They were authorized to withdraw and use the 'surplus water' which might be incident to the operation of the canal, but the state was not bound to create such surplus. Their lease contained no covenant to repair or stipulation to maintain or obligation to operate the canal, nor any agreement to supply power to the plaintiff's mill."

All this is the language of the law of contracts. The basic theory is not that because the state is sovereign and not a proprietor, it therefore can with impunity break its contract. The legal philosophy is that the state has never made a contract to supply water, as such. The whole effect of the sovereign aspect is merely to aid the court in construing the nature of the contract entered into. It is because the state in its sovereign right might want to change the use of the canals to another use and thus abandon the canals that the contracts must have been made by the parties as, and were construed by the parties to be, mere privileges to take canal water. If no canal, no water. If no surplus, no obligation to deliver.

The water leases in the case at bar contain the same provisions in fact and were made under the same statutory authority, to wit, the act of 1840, as were the water leases before the courts in the Fox and Hubbard lines of cases. There were the same provisions (Maumee Rec., p. 69) for "surplus water", the same reference to "canal water"—the same provision for the "right of resumption"—the same reference to the rights of the water lessees being "privileges". Note (Maumee Rec., p. 69.) "All the surplus water of the Miami and Erie canal between Providence and Toledo not needed for navigation or not now under lease"; and again (p. 71), "The party of the first part (state) reserves the right to resume at any time the use of the water hereby leased whenever the same shall become necessary for the purpose of navigation", etc. And again (Rec., p. 71), "Destroying the value of the privilege"; (Rec., p. 73) "the rights and privileges hereby granted." And further, it is not disputed, and was in fact so found by the lower court (Maumee Rec., p. 175) that the whole authority to make these leases by the board of public works was derived from the act of 1840 (our Maumee brief, p. 69), which contained the provisions (Section 20) that "whenever in the opinion of the board of public works there shall be surplus water in either of the canals"; again (Section 22), "no hydraulic power or right to the use of any water shall be so leased or conveyed except such as shall accrue from the surplus water of the canal"; also (Section 23), "every lease * * * shall contain a reservation and condition that the state or its authorized agents may, at any time,

resume the privilege or right to the use of the water", etc. The effect of these statutory provisions on the power of the state officials to grant rights was, of course, in the minds of the courts in the Hubbard case, p. 396, and the Fox case, p. 784, in determining the interpretation and effect of the water leases.

In view of the foregoing, is not the statement, which is the **ratio** of the opinion below, that "the leases and grants owned by the plaintiff are subject to a present-day construction and interpretation in relation to the surrounding facts and circumstances in harmony with the present relationship of the parties" obvious error? That which is by its plain terms a **privilege** to take surplus canal water granted by an officer of the state, who by law had authority to do no more, cannot be stepped up as a matter of "present-day construction" into an **absolute agreement to deliver water at all events**. The question now as in 1881 is,—what **is** the agreement of the state and what authority **did** the state official have? The answer is that the agreements made in the case at bar were the same as the agreements made in the Hubbard and Fox cases, to wit, agreements to give water lessees the privilege of taking surplus canal water. If there be no canal or no surplus, then there is no water. A "present-day construction" of the same contract cannot increase the obligations of the contract, nor augment the power of the official acting for the state.

B.

STATE VS. MIDDLETOWN HYDRAULIC CO., 114 O. S., 439, REPRESENTS NO DEPARTURE IN OHIO LAW FROM THE PRINCIPLES ESTABLISHED IN HUBBARD VS. TOLEDO, 21 OHIO ST., 379, AND ITS SUCCEEDING CASES.

Opponents' chief reliance is upon State v. Middletown Hydraulic Co., 114 O. S., 439, as showing that the foundation rule in Ohio established in the Hubbard line of cases has changed. And the vital error in the decision appealed from arises from the lower court turning a fugitive dictum in the Middletown case, to the effect "that the position of the state has changed from that of operating the canal as a navigable highway to the operation of a great power plant," into the ratio of its decision. The Middletown decision is not based on any interpretation or consideration of the effect of a lease from the state of Ohio to any water lessee. There was no lease. The question in the Middletown case was not what a water lessee got but what the state of Ohio got by reason of a grant from one Enoch, who was originally occupying a water power site and made a grant to the state. It is inconceivable that the Middletown case overruled the Hubbard decision. The Hubbard and Fox line of cases were not even mentioned in the majority opinion of the court. Certainly the Supreme Court of Ohio has not changed a rule established in the Hubbard case in 21

O. S., and thereafter adhered to in Elevator Co. v. Cincinnati, 30 O. S., 629; Fox v. Cincinnati, 33 O. S., 492; State v. Board of Public Works, 42 O. S., 607, and Voight v. Railroad Company, 58 O. S., 123, without even referring to those cases. The reading of the syllabus, which under principles of Ohio law contains the **decision** of the court, discloses no mention of the Hubbard and kindred cases. Further, no abandonment act of the legislature was involved in the Middletown case.

The question at issue in that case and the point of difference between the majority and the minority opinions was not what were the rights of a lessee under a canal lease from the state, but whether the state of Ohio itself **could** under 23 O. L., 57 (the act of 1828), take less than a fee simple title when it occupied a parcel of land for canal purposes, even though in the grant to the state there was a reservation by the grantor of pre-existing water rights.

The Middletown case, as a decision, leaves the Hubbard decision untouched.

C.

THE OBITER OF THE MIDDLETOWN HYDRAULIC CASE CONSIDERED.

If the law of Ohio in reference to the rights of canal water lessees made under authority of the act of 1840 is to be changed from the rule of the Hubbard and the Fox cases, it will not be by the decision in the Middletown case but by an affirmance in this court of the er-

roneous decision below. That decision followed the above quoted obiter at page 448 in the Middletown case, and this obiter is repeated throughout opponents' briefs in this court. In reply we contend:

1. Non-use of the canal by the public for navigation purposes does not constitute an abandonment of the canals by the state. Only an owner can abandon property or change its use.

Adams v. Hodgkins, 109 Me., 361.

Opponents contend that when the last boat stopped, the state ceased to be sovereign with respect to its canal property. Here is the fallacy. The property still remained canal property, even though the public did not use it as such. It remained devoted by the state to a public use until the state, by act of its legislature, changed the use, and this, with reference to the particular section of the canal in question, was not 1895, but in 1927, when the act of abandonment here in question was passed. This act of the state with reference to the abandonment of this particular section harmonizes with the policy pursued throughout the canal history, starting with the original abandonment act of 1861, which act abandoned part of the canal in Toledo and came before the courts in Hubbard v. Toledo, 21 Ohio St., 379, and the abandonment act of 1863, reviewed in the case of Fox v. Cincinnati, 104 U. S., 783.

2. Even if it were a fact, which it is not (Point 4, post), that the leases in question were made after cessation of navigation by the public, those leases were in the

same language as always and, therefore, as a matter of contract law, whatever the state's status,—sovereign or proprietary—impose the same obligation upon the state as theretofore, to wit, merely the obligation to give the privilege to take surplus water out of the canals. See Point A, supra. Further, those leases were granted under the same authority as theretofore, to wit, the act of 1840. Non-use for navigation purposes by the public could not increase the authority of the board of public works under that act.

3. There is no question that the state can and does, in certain situations, act in a proprietary capacity. How did the state act in relation to the particular leases in question? That is conclusively shown by the provisions of the act of 1840—the state, through the board of public works, was acting in its governmental capacity in granting leases of surplus water out of its public canals in substantially the same language, with the same power of resumption as always.

4. Opponents, straining to get in under the loose obiter in the Middletown case, try throughout their brief to create an impression that at the time their leases were made navigation had ceased. At page 105 they say: "and when appellee acquired its first lease, the Law lease, navigation had wholly disappeared."

If we are correct in points A, C1, C2 or C3, supra, the cessation of navigation, even if it were a fact, would be immaterial.

However, meeting the fact issue of cessation of navigation, because it was part of the basis of error below,

we contend that navigation had not ceased before acquisition of opponents' foundation lease in 1895. In substantiation of this, we say:

(a) The lease itself (Maumee Rec., p. 68) clearly indicates that navigation was still going forward; (Rec., p. 69) "surplus water * * * not needed for navigation"; (p. 71) "Whenever the same (water) shall become necessary for the purposes of navigation", etc.

(b) Further, the supplementary Law lease in 1910 (Rec., pp. 24, 25) grants rights "all consistent with the rights of navigation upon said canal."

(c) Note also the act of 1902, frequently in other aspects relied upon by opponents and set out in their brief (p. 246), Section 1 of which is as follows:

> "Be it enacted by the general assembly of the state of Ohio:
>
> Section 1. That it is hereby declared as a settled policy of this state that the Miami and Erie canal, together with its water supply * * * reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo, shall be retained and maintained as a public canal."

Then follows Section 2, containing the provisions that all boats

> "built for use * * * shall be paid for by the state * * * if at any time in the future the policy of the state shall be changed by abandonment of either or both of said lines of canal * * *."

Certainly, therefore, in 1902, seven years after the Law lease was made, there is indicated by legislative act not only the existence of navigation, but a legislative pur-

pose not to abandon the canals, but on the contrary to encourage their use.

(d) Opponents blow to the bursting point an admission made by counsel representing the state of Ohio in the prior administration. The answer of the state admitted (Rec., p. 30) the allegations of the bill respecting navigation. The allegation admitted (Rec., pp. 3 and 4) was that "between the years 1894 and 1900 navigation on said canal entirely ceased as a business." Even the admission went only so far as to say that navigation had ceased "between the years 1894 and 1900." This was vague and did not fix the exact year. Present counsel for the state regard the admission as unfounded in fact, and therefore a motion to amend the state's answer denying the allegation with reference to navigation and setting up the true facts, is being filed contemporaneously with this brief. The present attorney general feels it is his duty to set out the true and exact facts with reference to navigation, supported by an affidavit of the superintendent of public works. But, whether that motion be allowed or not, there is enough in the present record, as above pointed out [(a), (b), (c)], and now before the court, on this immaterial issue of cessation of navigation, to demonstrate that navigation had not ceased in 1895.

In this connection it is interesting to note that opponents, in their brief at pp. 58 and 59, place great reliance on the act of 1902, the theme of their argument being that the Maumee Valley Electric Company made great improvements in their plant, relying upon the vitality of the canal system as disclosed by the legislative intent in

the act of 1902. Opponents cannot blow both hot and cold. The act of 1902 clearly discloses that there had been no abandonment of the canal system by the state, but, on the contrary, a legislative pronouncement of an intention to maintain the canal system. The success or failure of that legislative purpose is immaterial.

(e) If the motion to amend the state's answer be granted, it will be disclosed that navigation on the Miami and Erie canal in fact continued until at least the year 1918. The public records in the department of public works disclose that, far from navigation having "practically disappeared" by 1894, the actual tolls charged and received by the state on a tonnage basis for the transportation of freight on the Miami and Erie canal alone in 1894 were $24,733.98. A complete statement of tolls for succeeding years is as follows:

1895	$17,699.28	1907	4,515.62
1896	17,095.53	1908—Record missing	
1897	13,111.48	1909	2,750.43
1898	10,072.49	1910	2,260.71
1899	13,436.98	1911—No record available	
1900	14,259.45	1912	1,600.58
1901	12,860.15	1913	951.45
1902	10,467.05	1914	297.05
1903	5,419.62	1915—7½ mos.	1.09
1904	3,654.31	1916	6.15
1905	3,243.55	1917—No record available	
1906	4,037.55	1918	816.00

So we see from the above table that canal tolls were being received on the Miami and Erie canal even as late as 1918.

(f) The unworkability of the rule contended for by opponents must challenge attention. Whether the lease gives a privilege to take, or contracts for water absolute depends upon what? It depends, opponents say, upon whether the state's status was governmental or proprietary. When? At the time of the making of the lease—or at the time of adjudication? If at the time of making—how explain the decision of the court below in the Providence Mill case? There the parties' agreements were in 1842! Surely there was navigation then. The obiter in the Middletown case does not fit with the case. There the grant was made in 1825. Yet the court obiter dictum said the status of the state had changed from governmental to proprietary. When? It is not, from the language used, clear whether the obiter referred to 1825—which of course it could not because navigation was just beginning then—or to 1926 the year of the decision. If the Middletown obiter means that the interpretation of the contracts depends upon conditions at the particular time the interpretation thereof is before the court, then quite obviously an absurd and unworkable rule would be established which has never received sanction of the Supreme Court of Ohio by way of decision or of this court.

D.

THE DECISION IN MAUMEE VALLEY ELECTRIC COMPANY v. TOLEDO.

Opponents rely also upon **Maumee Valley Electric Company v. Toledo**, 13 Fed., 2nd, 98. In reply we point out (a) the state of Ohio was not a party and its rights, therefore, were not adjudicated; (a) we have no quarrel with the correctness of the legal decision in that case. It is predicated entirely on the language of the abandonment act of February, 1920, Section 7 of which expressly provided that if the city of Toledo accepted the grant, then Toledo should "pay the water lessees a fair compensation for the loss of the water to which they are entitled." There is no such provision in the abandonment act of May 11, 1927, now before this court. This act is entitled:

> "An act to abandon a portion of the Miami and Erie canal in Lucas county, Ohio, and to devote the same to highway and other purposes, and to repeal all acts in conflict therewith",

and, by Section 4, provides that all water leases "shall become and be null and void after sixty days." (Our Maumee brief, p. 74.)

It is interesting to note from the extensive review of the abandonment acts set forth in Maumee record (pp. 159 and 160), starting with the act of 1861, which was before the Supreme Court of Ohio in the Hubbard case, and the abandonment act of 1863, before the Supreme

Court of the United States, in the Fox case, that the abandonment act of February, 1920, was the only one contemplating any compensation to those who lost water privileges. Of course, the state legislature could, as a matter of grace, grant compensation, or, as a matter of liberality with another's money (Toledo) provide for compensation. But, as clearly indicated by Judge Knappen in that decision, there was no **obligation** on the state legislature so to do. Our only quarrel with the language of the court is not with the discussion of the law involved, but an implication on page 104 of the decision that there was a "moral obligation" to the water lessees. Was there even a moral obligation, in view of the decisions by the Ohio Supreme Court and the United States Supreme Court over a period of more than fifty years holding that water lessees got only a privilege to take surplus water and not an absolute contract for water as such. The explanation of the reference to "moral obligation" must be ascribed to the absence of any presentation of the state's point of view in the case before the court. However, all must admit that we are concerned here with legal, not moral, obligations—the discharge of those must be left to the law-making body in Ohio, to wit: the General Assembly.

(c) The act of 1920 related solely to Lineal Part I, that is, from Swan creek to Maumee Side Cut (Maumee Rec., p. 168), and, of course, therefore could give appellee no right with respect to Lineal Part II which is the subject matter of the present abandonment act. It is claimed by appellee (Maumee brief, pp. 168 to 191) that

the act of 1920 constituted a contract for the benefit of the appellee. It is true that the city of Toledo was, under the terms of the act, obligated to make payment to the appellee in case it turned off the water under the terms of the act. There was no assurance or commitment by the state as to a continuity of water and no surrender of any of the state's sovereign rights over the remaining portions of the canal not touched in that act. There being no commitment whatever in this respect, none can be raised by implication, since the rule is that grants by a sovereign state are construed most strictly against the grantee.

E.

PROVIDENCE MILL CASE, No. 675.

In so far as special reference need be made to the Providence Mill case, we submit in reply the following:

(a) The entire theory of the lower court,—predicated on the change of the state's status from governmental to proprietary because of non-use by the public for navigation,—certainly can have no application to the Providence Mill case where the agreements between the parties were made in the year 1842 (Providence Rec., page 337) when navigation was of course active.

(b) The gist of opponents' argument is that the state of Ohio acquired but a qualified fee under the Minor grant, thus opponents seek to bring the Providence case under the actual (not obiter) holding in the Middletown case. A complete answer to this position is found in the

language of the lease from the state to Minor. It should be noted that Minor took a lease from the state, which was not true of Enoch in the Middletown case. Enoch had existing water power never granted to the state, but expressly reserved in his deed (see 114 O. S., p. 444). In this case Minor's property had already been taken. The Minor lease (Providence Rec., 37) was in no sense a conveyance of anything from Minor to the state. It was the grant by the state of the right to surplus canal water as compensation for property already appropriated by the state. The lease plainly discloses that all of Minor's property interests therein described had already vested in the state and the lease of surplus canal water was a new thing **granted to him** and not a prior existing interest **reserved by him.** That is the essential difference. The new thing was the right to a definite amount of **surplus** water "except when otherwise necessary for the navigation of the canal." It should also be noted that the lease from the state to Minor was in 1842 and was executed on behalf of the state under authority of the act of 1840, which clearly limited the power of those acting on behalf of the state to granting qualified water privileges. To the same effect is the final allowance to Peter Minor (Rec., pp. 47, 48). To give the construction sought by opponents to the plain language of the instruments which passed between the state and Minor, would be to construe those instruments as granting rights beyond the power of the board of public works under the act of 1840. Even if it be admitted that the act of 1831 (Opponents' brief, p. 33) constituted the authority for

the Minor lease, yet its terms, when analyzed, are no broader than those of the act of 1840. Clearly the authority to grant a portion of the water power conferred by the act of 7831 is referable to the water power mentioned in the first portion of the act, which is "a greater quantity of water * * * than is required for the purposes of navigation."

Accordingly, the final adjustment of the state with Minor gave nothing more than a right to surplus canal water and, were these instruments susceptible of a broader construction, they would be unauthorized and void as beyond the statutory powers of the state administrative officials. **State, ex rel. v. Board of Public Works**, 42 O. S., 607. It follows that the discussion relative to the surplus water privileges of the Maumee Valley Electric Company is equally applicable to this case. It should be pointed out, however, that **Maumee Valley Electric Company v. Toledo**, 13 Fed. (2nd), 98, has no pertinency here, for the Providence Mill privilege is not upon the portion of the canal involved in the act of 1920.

CONCLUSION.

In conclusion we contend that despite the copious citation of authorities and extent of matter contained in opponent's voluminous brief, these cases fall within a very narrow compass. All that is necessary to decision are the instruments between the parties, the act of 1840, the Fox and Hubbard cases, the Middletown cases, and the abandonment act of 1927. When clearly focused, all

that is involved is the right of the state of Ohio to abandon for canal purposes and to now devote to highway purposes a sixteen mile section of one of its canals without making payment in damages to holders of water privileges affected thereby. The court has an intimation of the amount of payments that would be required from the estimates in this record that appellee's water rights in case No. 674 alone are valued at $400,000.00 (Record, page 165). Must Ohio withhold following the march of progress and forego its purpose to devote part of its own property to a new and modern use for the benefit of the public? Must Ohio also continue for another generation to divert part of its public water for the pecuniary profit of a private corporation? It would have to, if the settled rule of law with reference to the rights of those who have water privileges granted under the authority of the act of 1840 is to be changed. No constitutional question is here involved. No property of appellees is being taken, because as a matter of simple contract law the water lessees have mere privileges to take surplus canal water—no absolute contracts for water as such. The questions involved are the same today as in 1871 in Hubbard v. Toledo, in 1884 in Fox v. Cincinnati. Those cases are still the law in Ohio unimpaired by the obiter in the Middletown case, and emphatically call for the reversal of the judgment below, if not indeed a dismissal of the case for want of a federal question involved.

Respectfully submitted,

GILBERT BETTMAN,
Columbus, Ohio,
Attorney General of Ohio,
L. F. LAYLIN,
Columbus, Ohio,
JOSEPH A. GODOWN,
Columbus, Ohio,
Solicitors for Harry J. Kirk.